

Case No. SC95758

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI, EX REL. TIVOL PLAZA, INC.,
Appellant,

v.

MISSOURI COMMISSION ON HUMAN RIGHTS, *et al.*,

RESPONDENT KAREN NORTON'S SUBSTITUTE BRIEF

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B. The Circuit Court did not err in dismissing Appellants' Petition for Mandamus: Pursuant to RSMo. 213.111.1, the Commission has no authority to perform any act other than issuance of a right to sue letter, once it is duly requested. Thus, Mandamus is inappropriate.

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C. The present case is distinguishable from *Farrow v. Saint Francis Med. Ctr.* because in this matter it is not clear from the face of the charge whether it has been timely filed. Thus, Defendant's remedy

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POINTS RELIED ON

1. TIMELINESS IS NOT A JURISDICTIONAL ISSUE. AFTER 180 DAYS HAVE ELAPSED SINCE THE FILING OF A CHARGE OF DISCRIMINATION AND THE COMPLAINANT HAS DULY REQUESTED A RIGHT TO SUE, THERE IS NO OBLIGATION OF THE MCHR TO RESOLVE THE REMAINING DISPUTED FACTUAL ISSUES.

2. THE CIRCUIT COURT DID NOT ERR IN DISMISSING APPELLANTS' PETITION FOR MANDAMUS: PURSUANT TO RSMO. 213.111.1, THE COMMISSION HAS NO AUTHORITY TO PERFORM ANY ACT OTHER THAN ISSUANCE OF A RIGHT TO SUE LETTER, ONCE IT IS DULY REQUESTED. THUS MANDAMUS IS INAPPROPRIATE.

3. THE PRESENT CASE IS DISTINGUISHABLE FROM *FARROW V. SAINT FRANCIS MED. CTR.* BECAUSE IN THIS MATTER IT IS NOT CLEAR FROM THE FACE OF THE CHARGE WHETHER IT HAS BEEN TIMELY FILED. THUS, DEFENDANT'S REMEDY IN THE PRESENT CASE IS AN ADMINISTRATIVE REVIEW PURSUANT TO RSMO 536.150.1.

I. FACTUAL BACKGROUND

Karen Norton worked for Appellant Tivol Plaza, Inc. (hereinafter,

“Tivol”) from July 6, 2011, until her termination on November 18, 2013. *See* LF pp 9-13. 30 days thereafter, on December 18, she filed a dual complaint with the Missouri Commission on Human Rights (hereinafter, “MCHR”) and Equal Employment Opportunity Commission, asserting discrimination on the basis of sex, age, hostile work environment, and retaliation for exercising rights conveyed as a member of each of the foregoing protected classes. *Id.* On the face of the charge, Ms. Norton asserted a continuing violation commencing in April, 2012. *Id.*

The parties dispute the underlying facts asserted in Ms. Norton’s charge, and the reason for Ms. Norton’s termination. *Id.* Further, Tivol challenges the timeliness of some of Ms. Norton’s allegations. *See* LF pp. 5-6; 14-19. On February 27, 2014, Tivol submitted a position statement denying Ms. Norton’s allegations, and requesting that the MCHR make a specific factual finding concerning each of Ms. Norton’s claims; requesting that the MCHR dismiss any claims occurring 180 days prior to the filing of the charge; and informing the MCHR that its failure to make such factual findings would be considered an arbitrary and capricious administrative action and an abuse of discretion, within the meaning of RSMo. 536.150.1. *See* LF 14-19.

On June 30, 2014, pursuant to Ms. Norton’s request, and as

provided by RSMo. 213.111.1, the MCHR administratively terminated its proceedings without having completed its investigation, and issued a “right to sue” letter. *See* LF 20.

On July 28, 2014, Tivol filed a Preliminary and Permanent Writ of Mandamus in the Circuit Court of Cole County, Missouri challenging the MCHR’s issuance of the “right to sue” letter. *See* LF 3-8. On October 9, 2014, the MCHR filed its Motion to Dismiss. *See* LF 41-53.

On February 18, 2015, the Circuit Court issued judgment, dismissing Tivol’s Petition for failure to state a claim. *See* LF 81-85. In its order, the Circuit Court stated that the MCHR was required, by law, to issue the “right to sue” letter; further, that court contrasted the present case from *Farrow*, noting that the defendant in *Farrow* failed to raise the issue of timeliness at the administrative level, whereas Tivol preserved its timeliness defense by asserting it at its earliest opportunity to do so- in the position statement. *Id.* Tivol appealed the Cole County Circuit Court’s decision to the Court of Appeals for the Western District, and for the reasons stated in their respective transfer motions, all three parties have appealed that decision to this Court.

II. ARGUMENTS AND AUTHORITY

A. TIMELINESS IS NOT A JURISDICTIONAL ISSUE.

AFTER 180 DAYS HAVE ELAPSED SINCE THE FILING

OF A CHARGE OF DISCRIMINATION AND THE COMPLAINANT HAS DULY REQUESTED A RIGHT TO SUE, THERE IS NO OBLIGATION OF THE MCHR TO RESOLVE THE REMAINING DISPUTED FACTUAL ISSUES.

The issue before the Court is what the appropriate course of action is, when 1) there is a factual dispute as to timeliness; and 2) the MCHR has failed to resolve it prior to a request for “right to sue” after 180 days, pursuant to RSMO 213.111.1.

Timeliness is not a jurisdictional issue. An untimely filed claim or charge is either outside its statute of limitations or fails to state a claim upon which relief may be granted. These are affirmative defenses; want of jurisdiction or lack of a claim upon which relief can be granted is not an affirmative defense in Missouri. It need not be pled nor proven as such. Pursuant to Rule 55.27(g)(3), if a court should at any time determine it lacks jurisdiction, it is required to dismiss the case.

The jurisdiction of the MCHR is statutorily defined: “As a creature of statute, an administrative agency’s authority is limited to that given it by the legislature.” *State ex rel. Missouri Public Defender Com’n v. Waters*, 370 S.W.3d 592, 598 (Mo. 2012). Further, “[t]he rules

of a state administrative agency duly promulgated pursuant to properly delegated authority have the force and effect of law and are binding upon the agency adopting them.” *State ex rel. Martin-Erb v. Missouri Com’n on Human Rights*, 77 S.W.3d 600, 607 (Mo. 2002).

The MCHR’s jurisdiction in enforcing the MHRA is general. RSMo. 213.030.1. The Commission is empowered to eliminate and prevent discrimination in employment on the basis of race, color, religion, sex, national origin, ancestry, disability, or age. 8 C.S.R. 60-1.010.3. Moreover, the MCHR has jurisdiction over all persons, public or private, except those specifically exempted by law because of the overriding public concern in eliminating discriminatory practices. *Id.*

The logical conclusion of this is that timeliness is not a jurisdictional requirement for the MCHR. 8 C.S.R. 60-2.025(7)(B)(4) requires the MCHR to dismiss a complaint it finds to be untimely for want of a remedy, not for lack of jurisdiction. Indeed, an untimely filed claim could easily fall within the realm of eliminating discriminatory practices against members of statutorily protected class members. Suppose, for instance, the MCHR receives an untimely filed charge asserting discrimination on the basis of age, and wants to investigate whether other elderly employees at the same company were subject to similar adverse treatment. 8 C.S.R. 60-2.025(7)(B)(4) would require the

complaint to be dismissed, as there is no remedy, but the public policy in eliminating discrimination against older workers would keep the facts asserted in the charge within the jurisdiction of the MCHR, should it want to further pursue the matter.

However, RSMo. 213.111.1 provides, “If, after one hundred eighty days from the filing of a complaint alleging an unlawful discriminatory practice...the commission has not completed its administrative processing and the person aggrieved so requests in writing, the commission shall issue to the person claiming to be aggrieved a letter indicating his or her right to bring a civil action within ninety days of such notice against the respondent named in the complaint.” In the present situation, the MCHR has not had an opportunity to make a factual finding, nor is it required by the MHRA to determine timeliness within a specified period of time, but it is required, by law to issue the “right to sue” letter.

The appropriate remedy, then, for a defendant challenging the issue of timeliness would not be mandamus but section 536.150.1: “When an administrative body...having rendered a decision which is not subject to administrative review... such decision may be reviewed by suit for injunction, certiorari, mandamus, prohibition, or other appropriate action.”

B. THE CIRCUIT COURT DID NOT ERR IN DISMISSING APPELLANTS' PETITION FOR MANDAMUS: PURSUANT TO RSMO. 213.111.1, THE COMMISSION HAS NO AUTHORITY TO PERFORM ANY ACT OTHER THAN ISSUANCE OF A RIGHT TO SUE LETTER, ONCE IT IS DULY REQUESTED. THUS MANDAMUS IS INAPPROPRIATE.

Mandamus is the wrong remedy for the case present. Mandamus is appropriate for compelling a public official or state agency to do something it is required by law to do.

RSMO 213.111.1 is unambiguously clear: "(After 180 days have passed since the filing of the charge of discrimination, if the MCHR has yet to complete its investigation, and the complainant has requested a "right to sue" letter), "the commission **shall** issue to the person claiming to be aggrieved a letter indicating his or her right to bring a civil action within ninety days of such notice against the respondent named in the complaint...Upon issuance of this notice, the commission **shall terminate all proceedings** relating to the complaint." (Emphasis added).

In other words, a mandamus action cannot lie upon the proper issuance of a "right to sue" letter: Once such a letter is issued, the

MCHR lacks authority to make any further factual findings; thus nothing can be compelled of it. At that point, any ministerial duties it may have cease. Mandamus is appropriate for compelling the MCHR to investigate the issues and make factual findings prior to the termination of the administrative proceedings, and it is appropriate for compelling the MCHR to dismiss claims that the regulations require it to dismiss.

It is a wholly inappropriate remedy for judicial review of factual findings. Instead, these findings are most appropriately challenged at the trial level, or if a civil action is unavailable, as otherwise provided by RSMO 536.150. Mandamus is not a mini-trial mechanism.

C. THE PRESENT CASE IS DISTINGUISHABLE FROM *FARROW V. SAINT FRANCIS MED. CTR.* BECAUSE IN THIS MATTER IT IS NOT CLEAR FROM THE FACE OF THE CHARGE WHETHER IT HAS BEEN TIMELY FILED. THUS, DEFENDANT'S REMEDY IN THE PRESENT CASE IS AN ADMINISTRATIVE REVIEW PURSUANT TO RSMO 536.150.1.

In *Farrow*, it was clear from the face of the charge that it was not filed within 180 days of the last discriminatory act. *Farrow v. St. Francis Med. Ctr.*, 407 S.W.3d 579, 588 (Mo. banc 2013). Thus, the

facts of that case are distinguishable from those in the present matter, where neither party disputes that Ms. Norton filed her charge within 180 days of being terminated. Therefore, while mandamus may have been appropriate in that case, it is the wrong remedy, here.

A right to sue letter is a “finding” within the meaning of the MHRA. *Id.*, at 590 fn.5 (Mo. 2013). Pursuant to RSMo. 213.085.2, Tivol, in the event it disagreed with the issuance of a right to sue letter, should have sought administrative review, as provided in 536.150.1 within 30 days of the issuance of the letter. It is for this reason that the request for writ of mandamus was properly denied by the Circuit Court. Indeed, the MCHR cannot be compelled to do something it was required by law to do but failed to do, because RSMo. 213.111.1 required the MCHR to issue the letter- and it did.

III. CONCLUSION

In light of the foregoing, Karen Norton respectfully requests the Court affirm the judgment of the Circuit Court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In compliance with Rule 84.06(c), counsel for Respondent Karen Norton states that this Substitute Brief complies with the provisions of Rule 84.06(b), in that beginning with its Points Relied on, and concluding with the last sentence before the signature block, the brief contains 1,767 words. Further, the brief is in compliance with Rule 84.06(a) in that it was prepared using Century Schoolbook font, with a 13 point size which is no larger than Times New Roman font, 13 point size. Moreover, the brief has been scanned for viruses, and is free of the same.

/s/ Phillip M. Murphy II

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court using the Missouri eFiling System, which provided notification of the same as detailed below.

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